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No. 235

In the

# Supreme Court of the United States

OCTOBER TERM, 1949

LOUIS SOBLE,

*Petitioner,*

*v.*

THE STATE OF TEXAS,

*Respondent.*

## MOTION TO APPEAL, PETITION FOR WRIT OF CERTIORARI, ASSIGNMENTS OF ERROR, AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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*Respondent.*

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## MOTION TO APPEAL

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*To the Honorable, the Supreme Court of the United States:*

Comes now Louis Soble, through his attorneys and files this, his motion to be allowed to appeal from the final judgment of the Court of Criminal Appeals of the State of Texas, at Austin, which judgment affirmed the judgment of the Criminal District Court of Dallas County, Texas, and prays for permission to file a petition for certiorari from this Court to the said Court of Criminal Appeals of Texas, in order to have same reviewed by this Honorable Court, and as grounds for his motion, he represents to the Court:

1. That he is a citizen of the United States.

2. That he is the Petitioner in the above entitled cause and desires to take an appeal to the Supreme Court of the United States.

3. That the crime of which he stands charged and for which he was indicted, tried, and convicted was an alleged burglary of one of his own buildings, in which had been stored certain damaged furniture, which he, the Petitioner, had previously sold to one Glenn L. Smith, from which Petitioner claimed Smith had removed all of the furniture prior to the date of the alleged burglary.

4. That Petitioner claims to be entirely innocent and would not have been convicted except for the illegal testimony admitted against him in the trial court of which he, in due time, objected, because such testimony was the result of an illegal search and seizure of Petitioner's premises, without a valid search warrant.

5. Petitioner verily believes he is entitled to a reversal of his conviction and earnestly prays this Honorable Court to take jurisdiction of this cause, in order that an innocent man may not be unjustly punished for a crime which he did not commit.

6. Petitioner's appeal is based upon the following grounds, to-wit:

A. Petitioner was denied due process of law, guaranteed by the Fourteenth Amendment to the Constitution of the United States in that the Court of Criminal Appeals of Texas, the Court of last resort, in the State of Texas, erroneously affirmed the action of the District Court in receiving evidence obtained by an illegal breaking, without a valid search warrant, the premises of Petitioner, and illegal search, without any process of law, of Petitioner's home premises.

B. Petitioner was denied the equal protection of the law, guaranteed by the Fourteenth Amendment to the Constitution of the United States, by the holding of the Court of Criminal Appeals of Texas, in affirming the action of the trial court, in admitting illegal testimony elicited from witnesses who, without warrant of law, broke into Petitioner's premises, nearly a year after the alleged burglary with which Petitioner was charged.

C. Petitioner was deprived of his civil rights, guaranteed to him as a citizen of the United States, under the Fourth and Fourteenth Amendments to the Constitution of the United States, in that the construction placed by the Court of Criminal Appeals upon Section 9 of Article 1, of the Constitution of Texas, which is in terms, virtually identical with the first portion of the Fourth Amendment to the Constitution of the United States, is contrary to and in conflict with the holdings of this Court relative to the meaning of such Amendment, and as so construed the said Section 9 of Article 1, of the Constitution of Texas, is in conflict with the meaning placed upon similar language in the Fourth Amendment, and thereby Petitioner is deprived of his liberty without due process of law, and he is denied the equal protection of the law afforded to other citizens of the United States.

D. Petitioner was deprived of a fair trial and was denied the equal protection of the law and was deprived of his liberty without due process of law by the construction placed upon Article 1, Section 9, of the Texas Constitution, and the pertinent Texas Statute, which taken to-

gether are in almost the identical language of the Fourth Amendment to the Constitution of the United States.

WHEREFORE, Petitioner prays that proper orders be issued to the Clerk of the Court of Criminal Appeals of Texas, at Austin, Texas, that the record in due form be sent to the Clerk of the Supreme Court of the United States, in order that errors committed by the Court of Criminal Appeals of Texas may be corrected and, in due course, this cause be reversed and remanded for a new trial in accordance with law.

Respectfully submitted,

A. S. BASKETT,

D. A. FRANK,
*Attorneys for Petitioner,*
*Louis Soble.*

GRADY NIBLO,
*Of Counsel.*

No. .....

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In the

# Supreme Court of the United States

OCTOBER TERM, 1949

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LOUIS SOBLE,

*Petitioner,*

*v.*

THE STATE OF TEXAS,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

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*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Louis Soble respectfully petitions for a writ of certiorari to the Court of Criminal Appeals of Texas to review its decision and judgment rendered on the 9th day of June, 1948, in the case of *Louis Soble, v. The State of Texas, 218 S. W. (2d) 195;* rehearing overruled 9th day of March, 1949.

## I.

## BRIEF SUMMARY OF MATTERS INVOLVED

Petitioner, a naturalized, foreign-born Jew, was engaged in the furniture, salvage business in Dallas, Texas, and bought, from time to time, from railroad warehouses,

job lots of damaged furniture. All the furniture so bought was broken or otherwise damaged in transit and had been refused by the owners or consignees.

He had accumulated eight storerooms of such furniture and, on or about the 6th day of March, 1946, he bargained with and sold to Glenn L. Smith, of Fort Worth, Texas, all of said furniture for an agreed consideration of $25,000.00. The furniture was to be moved promptly from the storerooms which were under lease by Soble.

Smith in due time moved all the furniture from seven of the storerooms and from the first floor of the eighth store, at 2717½ Elm Street.

Smith claimed that, on April 15th, he paid the rent on that building until May 1, 1946; that he had previously paid the entire amount of $25,000.00 as agreed upon, and that, at that time, the only merchandise he had left was in the upstairs at 2717½ Elm Street; that there was a lock on the building which was there on April 15th; that there were two or three rooms in the upstairs; that one room was stacked full of hats; that he had boxed up seven or eight large boxes of hats, about 40 or 50 hats in each box; that there were some miscellaneous tables, lamps, and odds and ends of furniture; that he came back on April 20th and found the lock gone off the door and everything upstairs was gone.

Smith testified further that he went to Soble and told him someone had broken the lock off and all the merchandise was missing; that Soble said that he broke the lock off but did not say that he took "the stuff" out.

"I told him that I was going to have him arrested and left. Yes, sir, I saw him later that day. I thought it over after I left and figured I DIDN'T HAVE ANY EVIDENCE THAT WOULD STAND UP IN COURT, and thought I would wait awhile without having him arrested." (P. 4 Rec.) "Well, I didn't do anything with reference to this missing, this breaking a lock up there until this negro that had been working for him sent word to me that he would tell me where the merchandise was."

"Yes, sir, I saw some of this missing merchandise again; we found the hats in Soble's garage, BEHIND HIS HOUSE on Cedar Springs."

Appellant duly objected to the evidence and all evidence obtained by the illegal search.

The Court of Criminal Appeals summarizes the situation in its opinion as follows: "Appellant admitted that he broke the lock from the door and entered the building at 2717½ Elm Street for the purpose of clearing it up but that *this was long after* appellant's lease or right of occupancy of the building had expired and that the reason he broke that lock was because Smith lived in another city and no key was available to the lock. Appellant denied that any merchandise was in the building belonging to Smith at that time, or that any merchandise was taken therefrom by him or Witness Powell. He DENIED that any of the merchandise found in his garage was the property of Smith and explained his possession of the property found in his garage by saying that he had purchased same through proper and legitimate channels."

The Court says further in its opinion: "It is insisted that the search of Appellant's garage and the findings of the merchandise therein were unauthorized because of an invalid search warrant.

"For the purpose of this discussion, it will be assumed THAT THE SEARCH WARRANT WAS INVALID and the search thereunder was unauthorized, but such, however, by no means shows reversible error for APPELLANT, TESTIFYING AS A WITNESS, ADMITTED POSSESSION OF THE PROPERTY FOUND IN HIS GARAGE."

It is this holding which Appellant here challenges and says deprived him of the rights and immunities as a citizen, denied to him the equal protection of the law, and deprived him of a trial, and of his liberty, without due process of law, contrary to the Constitution of the United States.

## II.

## JURISDICTIONAL STATEMENT

1. The jurisdiction of the Court is invoked under Section 344, of the Judicial Code as Amended: 28 U. S. C. Section 344(b). The judgment of the Court of Criminal Appeals of Texas to be reviewed was entered on June 9, 1948. Rehearing was denied March 9, 1949. The jurisdiction of this Court is sustained by the following cases:

*McDonald v. U. S., 93 L. Ed. Advance Opinions, p. 144;*

*Johnson v. U. S., 33 U. S. 10, 92 L. Ed. 323;*

*Fripiano v. U. S., 334 U. S. 699;*

*Baltimore, etc., R. Co. v. Hopkins, 130 U. S. 210, 32 L. Ed. 908;*

*Waters Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. Ed. 417;*

*Weston v. Charleston, 2 Pet. 449, 7 L. Ed. 481;*

*Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 47 L. Ed. 480;*

*Semple v. Hagar, 4 Wallace 431, 18 L. Ed. 402;*

*Helm v. McCall, 239 U. S. 175, 60 L. Ed. 206;*

*Charleston Fed. S. & L. Ass'n v. Alderson, 324 U. S. 182, 89 L. Ed. 857;*

*Copperweld Steel Co. v. Industrial Commission, 324 U. S. 780, 89 L. Ed. 1363;*

*Senn v Tile Layers Protective Union, 301 U. S. 408, 81 L. Ed. 1229;*

*S. W. J. & T. Co. v. Donaho, 239 U. S. 485, 59 L. Ed. 1420.*

2. The Court of Criminal Appeals of Texas is not an intermediate Court. It is the Court of last resort in Texas, in all matters within its jurisdiction, which comprehends all appeals from trials in the district and other courts having jurisdiction of criminal cases. The judgments of the Court of Criminal Appeals are final and not subject to review by the Supreme Court or any other Court in Texas.

## III.

## THE QUESTIONS HERE PRESENTED

The questions here presented are:

1. Whether Petitioner was deprived of rights guaranteed to him by the Fourteenth Amendment to the Constitution of the United States:

FIRST: In permitting evidence obtained by an illegal search of his premises to be used against him upon the trial.

SECOND: In the holding by the Court of Criminal Appeals that, assuming the search was illegal, Appellant waived its illegality by admitting possession of the personal property found upon his premises.

## IV.
## GROUNDS RELIED UPON FOR ALLOWANCE OF THE WRIT

A. Petitioner was denied due process of law, guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that the Court of Criminal Appeals of Texas, the Court of last resort, in the State of Texas, erroneously affirmed the action of the District Court in receiving evidence obtained by an illegal breaking, without a valid search warrant, the premises of Petitioner, and illegal search without any process of law, of Petitioner's home premises.

B. Petitioner was denied the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States by the holding of the Court of Criminal Appeals of Texas, in affirming the action of the trial court, in admitting illegal testimony elicited from witnesses who, without warrant of law, broke into Petitioner's premises nearly a year after the alleged burglary with which Petitioner was charged.

C. Petitioner was deprived of his civil rights guaranteed to him as a citizen of the United States, under the Fourth

and Fourteenth Amendments to the Constitution of the United States, in that the construction placed by the Court of Criminal Appeals upon Section 9 of Article 1, of the Constitution of Texas, which is in terms, virtually identical with the first portion of the Fourth Amendment to the Constitution of the United States, is contrary to and in conflict with the holdings of this Court relative to the meaning of such Amendment, and as so construed the said Section 9 of Article 1, of the Constitution of Texas, is in conflict with the meaning placed upon similar language in the Fourth Amendment, and thereby petitioner is deprived of his liberty without due process of law, and he is denied the equal protection of the law afforded to other citizens of the United States.

D. Petitioner was deprived of a fair trial and was denied the equal protection of the law and was deprived of his liberty without due process of law by the construction placed upon Article 1, Section 9, of the Texas Constitution, and the pertinent Texas Statute, which taken together are in almost the identical language of the Fourth Amendment to the Constitution of the United States.

## V.

## STATEMENT OF THE REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

1. The search was without the issuance of a legal search warrant and utterly without authority of law.

2. The only evidence upon which a conviction could have been based was that secured by the illegal search of Petitioner's home premises.

3. The decision of the Court of Criminal Appeals of Texas is in direct conflict with the decision of this Court in the *McDonald case, 93 L. Ed. advance opinion p. 144.*

4. The language of the Constitution of Texas and the supporting Statute being practically identical in words and meaning with the Fourth Amendment to the Constitution of the United States, the interpretation put upon same by the Court of Criminal Appeals being in conflict with the decision of this Court upon the same question, the Petitioner is thereby deprived of his liberty without due process of law and he is deprived of the equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States.

## VI.

## DISCUSSION OF THE REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

1. The search of the Petitioner's garage was without the issuance of a legal search warrant and utterly without authority of law.

There was no search warrant produced upon the trial. However, there was testimony that one had been issued and was lost or mislaid. The affidavit for the search warrant was introduced in evidence and same did not state the name of the person accused of having stolen the property; nor that the name of the person was unknown; the kind or value of the property alleged to have been stolen; nor the place where it was alleged same was concealed. These are essential elements of the affidavit as required

by law, without which no valid search warrant can issue. Therefore any search warrant based thereon is invalid, illegal and void, and any search by reason thereof is void and illegal.

The property found as a result of the improper search and seizure by reason of said invalid search warrant was admitted in evidence against this Petitioner as evidence of the alleged burglary as being the recent possession of property taken from the alleged burglarized premises as a result of said burglary. It was evidentiary of the burglary and the connection of this Petitioner with same, and not merely of the possession thereof by the Petitioner.

The Fourth Amendment to the Constitution of the United States is as follows:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall be issued but upon probable cause, supported by oath or affirmation, *and particularly describing the place to be searched, and the person or things to be seized.*"

Article 1, Section 9 of the Constitution of Texas is as follows:—

The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches, and no warrant to search any place or to seize any person or thing shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

*Article 310 of the Code of Criminal Procedure of the State of Texas*, is as follows:—

> "A warrant to search for and seize property alleged to have been stolen and concealed at a particular place may be issued by a magistrate whenever written sworn complaint is made to such magistrate, setting forth,
>
> "(1) The name of the person accused of having stolen or concealed the property, or, if his name be unknown, giving a description of the accused, or stating that the person accused of having stolen or concealed the property is unknown.
>
> "(2) The kind and value of the property alleged to be stolen or concealed.
>
> "(3) The place where it is alleged to be concealed.
>
> "(4) The time, as near as may be, when the property alleged to have been stolen."

*Article 318 of the Code of Criminal Procedure of the State of Texas* is as follows:—

> "The time allowed for the execution of a search warrant shall be three whole days, exclusive of the day of its issuance and of the day of its execution."

*Article 727a of the Code of Criminal Procedure of the State of Texas* is as follows:—

> "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas or of the Constitution of the United States of America shall be admitted in evidence against the accused on the trial of any criminal case."

The record in this case discloses that the purported search warrant was issued on Friday, and was served on

either Wednesday or Thursday of the following week—more than three days after its issuance exclusive of the day of its execution and of its issuance; It was therefore *functus officio* at the time of its execution.

The 14th Amendment to the Constitution of the United States provides, in part, as follows:—

> "Nor shall any State deprive any person of life, liberty or property, without due process of law."

In view of the fact that there was an unlawful search and seizure of the premises of this Petitioner in violation of the Fourth Amendment to the Constitution of the United States; and the fact that he is being deprived of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, a federal question is involved, and by reason thereof the Supreme Court of the United States has jurisdiction to entertain this application for a writ of certiorari.

2. The only evidence upon which a conviction could have been based was that secured by the illegal search of Petitioner's home premises.

3. The decision of the Court of Criminal Appeals of Texas is in direct conflict with the decision of this Court in the *McDonald case, 93 L. Ed. advanced opinion p. 149.*

That there is a conflict is apparent from a mere reading of the two decisions.

The language of the Fourth Amendment and the applicable Texas Rule as set out in Section 9 of Article 1 of the

Texas Constitution and the Statute being practically identical, and the interpretation placed by the Texas Court upon the language being in conflict with that of the Supreme Court to the hurt of a citizen of the United States, the holding of the State Court must yield to that of the Supreme Court, on the ground that the State Court's interpretation deprives the citizen of his civil liberties contrary to the Fourteenth Amendment to the Constitution of the United States.

Merely for convenience we quote the two Constitutional provisions. That of the Fourth Amendment is: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

The language of the *9th Section of Article 1 of the Texas Constitution is:* "The people shall be secure in their persons, houses, papers, and possessions from all unreasonable seizures and searches."

*Article 727a of Texas Code of Criminal Procedure,* provides that, "No evidence obtained by an officer or other person in violation of * * * the Constitution of the United States of America shall be admitted in evidence against the accused on the trial of any criminal case."

In the *McDonald case* the Court says: "We brought the case here on certiorari because of doubts whether the result

squared with *Johnson v. U. S., 333 U. S. 10 and Fripiano v. United States, 334 U. S. 699.*"

In the case at bar, the Court of Criminal Appeals says:

> "For the purpose of this discussion it will be assumed that the search warrant was invalid and the search thereunder was unauthorized but such however by no means shows reversible error, for Appellant testifying as a witness, admitted possession of the property found in his garage" * * * "Appellant * * * at no time admitting that such articles were illegally acquired." *Soble v. State, 218 S. W. (2d) 197.*

In support of the foregoing grounds for writ of certiorari, your Petitioner submits the accompanying brief, showing more fully the precise facts and arguments applicable thereto.

WHEREFORE, your Petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the Court of Criminal Appeals of Texas to the end that this cause may be reviewed and determined by this Court and that the judgment of the said Court of Criminal Appeals be reversed by this Court and for such other and further relief as to the Court may seem proper.

Respectfully submitted,

Louis Soble

LOUIS SOBLE.

THE STATE OF TEXAS }
COUNTY OF DALLAS }

Louis Soble, being duly sworn, deposes and says that he is the Petitioner in the foregoing petition for certiorari, has carefully read the same and knows the contents thereof and that the same are true and correct.

Louis Soble

LOUIS SOBLE.

SUBSCRIBED AND SWORN to before me, by Louis Soble, this, the 4th day of June, 1949.

Anna Myers

*Notary Public,*
*Dallas County, Texas.*

ANNA MYERS, Notary Public, Dallas County, Texas
My Commission Expires June 1, 1951

No.....

LOUIS SOBLE, *Petitioner,*

*v.*

THE STATE OF TEXAS, *Respondent.*

## ASSIGNMENTS OF ERROR

### FIRST

The Trial Court erred in admitting in evidence over the objections of the Appellant the testimony relative to certain property the possession of which was obtained by virtue of an insufficient and defective search warrant of the premises of the Appellant.

### SECOND

The Trial Court erred, after it was shown that the affidavit for the search warrant was wholly insufficient in law to support a valid search warrant, in overruling the Appellant's motion to withdraw from the consideration of the jury all that testimony obtained by reason of an unlawful search and seizure of Appellant's property and premises.

### THIRD

The Court of Criminal Appeals of the State of Texas erred in holding that by reason of the fact that Appellant took the witness stand and admitted the possession of the

property obtained by reason of the search with an invalid search warrant he cured the error of the admission of same in evidence.

D. A. FRANK,

A. S. BASKETT,
*Attorneys for Petitioner,*
*Louis Soble.*

GRADY NIBLO,
*Of Counsel.*

No.....

In the

# Supreme Court of the United States

OCTOBER TERM, 1949

LOUIS SOBLE,

*Petitioner,*

*v.*

THE STATE OF TEXAS,

*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

## I.

## STATEMENT

The Statement of issues involved, jurisdiction and the question presented appear in the foregoing petition for writ of certiorari.

The opinion of the Court of Criminal Appeals of Texas in *Louis Soble v. State, 218 S. W. (2d) 197*, discloses very clearly the errors complained of herein.

## THE FACTS

The facts substantially are that petitioner was engaged in the handling, wholesale and retail, furniture damaged in transit by railroad companies and sold in bulk at auction

to the highest bidders. Having filled up about eight storerooms of such furniture, he made a bulk sale to Glenn L. Smith of Fort Worth, Texas, for a stated consideration of $25,000.00 which was paid partly in cash and partly, as the furniture was removed. The contract was made on March 6, 1946.

Upon making the contract, padlocks were put upon all the doors. Smith claimed he paid rent upon all buildings to May 1. That rent was paid to Soble. The entire consideration was paid on April 6, at which time "the only merchandise that we had left stored upstairs in 2717½ Elm Street, just one building." On the same day Smith bought a new lock and put it on the door because "I didn't intend to go back and get the rest of that for several days." The lock was still on there on April 15.

The date when Smith came again to look at the contents of 2717½ Elm is in sharp dispute: He claimed it was April 20. Other testimony would indicate it must have been the latter part of May.

When Smith came back, he found the lock gone off the door and everything upstairs was gone. Significent is his statement that "the floor had even been swept clean." Smith and all other witnesses were testifying more than a year after the matters in dispute.

Smith had bought eight stores crammed full of old junk—broken up tables, chairs, boxes, book-cases, boxes of hats, lamps, and "odds and ends of furniture." He had no inventory and was very vague as to what furniture was left upstairs at 2717½ Elm Street. Smith testified that when

he found his "stuff missing and the lock broken" he went to Soble and complained and that *at that time* Soble Petitioner herein, told him "that he broke the lock off."

"I told him that I was going to have him arrested and left. * * * I thought it over after I left and figured I didn't have any evidence that would stand up in Court, and thought I would wait awhile without having him arrested."

"Well, I didn't do anything with reference to this missing, this breaking a lock up there until this negro that had been working for him sent word to me that he would tell me where the merchandise was."

As will be shown later that was in December of the same year, 7 or 8 months after the alleged breaking.

The testimony of Smith, objected to by Petitioner, (like that of others similarly objected to) was the only evidence upon which a conviction could have rested.

It appears in Smith's testimony as follows: "Yes, sir, I saw some of this missing merchandise again. We found the hats in Soble's garage, behind his house on Cedar Springs. Yes, sir, I had a search warrant. One of the deputy Sheriffs of the Sheriff's office was with me at the time I found it; and they had the search warrant. No, the Defendant Soble was not with us. He was not there. I next saw those hats and things taken from my place in Soble's garage. * * * It was in his garage. Well there was one lamp that had been in that building where the hats came from." This and all testimony by Smith was duly objected

to on the ground that such testimony obtained without the sanction of a legal writ is inadmissible, and deprives Petitioner of his rights without due process of law and denies to him the equal protection of the law as guaranteed to him by the Fourth and Fourteenth Amendments to the Constitution of the United States, as well as by Section 9 of Article 1, of the Constitution of Texas, and *Article 727a, Code of Criminal Procedure of Texas.*

This question was raised in every case where such testimony was offered and was carried forward to the Court of Criminal Appeals and was insisted upon before that Court to the very last argument made in that Court on behalf of Petitioner and was in each instance overruled over the earnest objection, protest and exception of Petitioner.

It is not thought necessary to quote each and all of the Statements of this and other witnesses objected to upon the same grounds. It appeared in the presentation of Petitioner's appeal in the Court of Criminal Appeals.

The Statement of the position of the Court of Criminal Appeals is thus stated in its original opinion: "For the purpose of this discussion, it will be assumed that the search warrant was invalid and the search thereunder was unauthorized, but such, however, by no means shows reversible error, for APPELLANT TESTIFYING AS A WITNESS, ADMITTED POSSESSION OF THE PROPERTY FOUND IN HIS GARAGE."

The Court goes on to say: "The only fact established by the search of Appellant's garage was that he possessed

the property found therein. This fact of possession, having *been admitted by him rendered his objection to the search untenable.* One may not complain of the receipt of evidence of facts which he also puts in evidence."

The fallacy of this reasoning is but too plainly obvious. If the Court had inquired in advance whether the Petitioner was the owner of personal property stored in his garage at the rear of his home upon the very same lot, he would not only have admitted it, but would have made an affidavit in writing to that effect. How would that have shown or tended to show he had stolen it somewhere else and stored it in his garage?

The Court missed the very point of the matter in that the objectionable testimony was that *that particular furniture* was the furniture which Smith owned and which came from the premises at 2717½ Elm Street.

The State Court recognizes the insufficiency of the negro Powell's testimony in characterizing him as "the accomplice witness Powell." Certainly without Smith's testimony above objected to there would not have been one line of testimony connecting defendant with the burglary of his own building at 2717½ Elm Street.

## PETITIONER'S TESTIMONY

We have thus far presented only testimony against Petitioner. Let us look at the facts from Petitioner's standpoint.

It must be recalled that Smith made this complaint at least eight months after he claims that the lock was broken and his "stuff" was taken out. There was no evidence

that he ever tried to make an inventory at any time of any of the furniture at any of the eight different stores where he had this "salvage" furniture stored. By the way, the Court will of its own knowledge know that in the hauling of hundreds of carloads of furniture, nearly all of it second-hand, in that it belongs to individual owners who have been using it prior to shipment a few pieces in each shipment are likely to be crushed or broken and the owners refuse to accept them from the Railroad. With as many transportation lines as concentrate in a great city like Dallas, it will be understood, that there is quite an accumulation of such broken furniture. It is this "salvage" or broken furniture with only a fraction of its value new, until worked over, repaired, new legs put on, etc., that is the property supposed to have been stolen in the burglary.

No memoranda were introduced by the State, that, in any way, fixed the date of the breaking of the lock. Only one memorandum was introduced that fixed the date of the break and that was B. P. Gillespie who testified at length and in detail. There is no testimony or even suggestion that there were two breakings of a lock upon the premises.

Gillespie whose place of business was at 2810 and 2818 Elm Street, testified he was in the rubber and tire business, just a block beyond the premises at 2717½ Elm Street, opposite side. He knew when Soble sold out. He remembered the occasion, one morning, when Soble came to his store and borrowed a pinchbar in order to take off the lock on the door up in the 2700 block. He went with Soble up there, There was a lock on the stairway, the door going up the

stairs. Soble took the lock off and went upstairs. Gillespie went upstairs also. "All I saw was some paper and paper boxes, and old panama hats, is all I saw. It was some kind of straw hats and it looked like a few had been tramped. The hats I saw were all over the house on the floor. I would say I saw, oh, just ten or twenty. Maybe more. Wasn't any of them good * * *. They were on the floor mixed up with paper on the floor. I never saw anything else in the building there. * * * he said he was going to clean the building out and start putting, you know, freight, in it."

The place evidently had not been cleaned up at that time. Gillespie testified further that on the same day he saw a colored boy with some hats and a load of paper and that Soble ran after the colored boy, who got away, and that at that time, he, the witness, found nine one dollar bills in the Street, spread out like a fan, between a pick-up and an automobile about 3 feet out in the street. The money had "a duplicate on a Wichita Falls bank, but you couldn't tell whose name was on it, and you couldn't tell the date on it, and it was just nine old one dollars bills."

The witness testified further: "After I examined it in my warehouse I took and wrote down in my little bank book the day I found it and how many dollars it was. * * * Yes, sir, I have got my bank book here now; it is in my pocket. That is mine, my personal bank book, my personal account. I put in this book May 29, 1946, found purse containing $9.00. I put that on May 29, 1946, found purse containing $9.00."

"Yes, sir, the day I found this money and made this entry was the same day I went up with Soble and went into that upstairs in the 2700 block, the same day."

This is the only piece of tangible physical evidence that fixes surely and definitely the date of the breaking of the lock.

Smith testified positively that everything had been removed and the "floor had been cleaned."

Gillespie testified Hawkins was with Soble when they went up to remove the lock. Hawkins went upstairs and saw straw hats on the floor that had been mashed and trampled up. Another colored boy cleaned up the floor. There was nothing there to haul away, but the old hats and "a whole lot of trash."

The Defendant (Petitioner) testified that Smith gave him all the keys to all the places except the upstairs. That Smith's brother-in-law hauled the last load which was just a bunch of kindling from the back yard. He asked for the keys upstairs and the brother-in-law didn't have it. He didn't need the key to the upstairs at that time because he had plenty of room. He had a man repairing furniture downstairs. He was complaining because the windows upstairs were open and he was afraid it would rain in.

Soble didn't know where to contact Smith. He did not have a hammer. He went to Gillespie's and got a tool that was used to change tires, and opened the door to the stairway. Mr. Smith had been gone about five weeks when that happened. It was at 9:00 or 9:30 in the morning.

"If there would have been anything left for me to steal I wouldn't steal it. I never stole anything."

He gave a negro the paper, boxes, and old hats to clean up the place.

"After I went in the place there and began using it Mr. Smith didn't come around until after about four or five days after May. I mean May, excuse me, June. Between the 5th and 6th of June, something like that. He came in and he said 'How come you, why did you take off the hasp?' I said, 'Well, you didn't leave me a key You know you left me a key for all of your stores.' He said, 'Why didn't you call me, I would have given you the key?' and I said I don't know where to call you'."

Two months later, according to Soble, Smith and a big man came to his store to try to get a statement that $2,000.00 worth of merchandise was missing from the store, claiming it was for "income tax purposes." The big man got mad when Soble refused to "help him out."

"I fix the time when I went into those premises and took the lock off the premises as May 29. That was some five or six weeks after he had moved everything out of the place, the last load."

Defendant accounted for the furniture found in his garage as being some articles Willie Powell had on his truck one night and no place to store them and another load hauled there directly from the railroad. The only thing from the old stock of eight months before were some hats bought by Hershel Soble from Smith after the latter bought out the eight stores.

## THE BLACKMAILER

The prosecution in this case depended upon the evidence of Willie Powell, called by the Court an "accomplice" but, by his own testimony, made out as a discredited blackmailer.

Petitioner's testimony goes into great detail as to Powell's efforts over several months to extort money from him. Apparently he used the device of charging for hauling and then doubling the charge. After giving a release in full for a bill at approximately $5.00 per load he decided to collect an additional amount.

He was discredited in nearly every statement he made but his admitted letter left under Soble's door tells the story better than any conclusions drawn from his testimony and that of others who contradicted him.

His letter, in full, is as follows:

> "Mr. Soble:—When you get this I be in Fort Worth. I give you just till 10.30 Oclock this morning to get me the other $150.00 you owe me and give me back the two hundred I paid a lawyer to get me out of jail Sunday. and you no I never ben in jail for stealing before untill you had me put in there. That made me have a reckard. I want one hundred and fifty for that which makes $500.00 total for the trouble you put me in. I not looking for you to pay this But if you don't you be sorrow because you is prison bown. You tried to send me but you & your son forgot that I can and is going to send you. Because the two fellows & Lee that help me move you is a widness for Mr. Smith & the list he have is enough to send you & then he sue you for all you worth & your nabors no what kind of man you is. I thought once when you was moving that stuff you was not supposed to go in there. he said after he give

Miss Girty the check that you was not suppose to go in none of those buildings after then & you don't remember that Hursey & Lee & me & another fellow hall until night on Main St & also from the Elm St. store after the red lock was put on. We also hauled stuff out on Citer Springs. You remember two fellows help me. I got their name & address. So if you don't pay me by 10.30 oclock you better get a lawyer at 11 oclock because I be on my way with Smith & the police and it be to late then. I did not no you was not suppose to go in those buildings until Mr. Smith to me when I went after that cash drawer. So at 10:30 I phone back and ask at Helen Hodge Cafe at Central & Bryant St. where if desired to give me the money you leave it there on Central ave. and Bryant St. Hodge Cafe where I going to phone. If you dont it OK with me because I mean bisness. This is from William Powell."

Powell said that when he and Soble opened up the store "Mr. Brown" a colored man had another truck there and after he loaded up, that Mr. Brown backed in and loaded up. George Brown, the "Mr. Brown" referred to, testified he had done hauling for Soble but "never did go up to the 2700 block of Elm Street, 2717½ upstairs door, where Soble was with a negro by the name of Willie Powell to haul some stuff away from there." He denied the entire incident as testified to by Powell.

## DISCUSSION OF THE REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

If this case were one that was tried in the Federal District Court, there could be no doubt of the action of this Court. Under authority of the case of *McDonald v. United States, 93 L. Ed. Advance Opinions, p. 144.*

Even under the conditions of this case, it must be observed that Texas has exactly the same rule under the Constitution and Statutes of the State, as that observed in the Federal Courts, and as laid down and enforced in the *McDonald case, supra.*

The Texas Statute (Art. 727a, C. C. P.) forbids the introduction of any evidence obtained by any "person in violation of any provisions of the Constitution or laws of the State of Texas, *or of the Constitution of the United States.*"

It would be readily admitted, we believe, that such testimony as was admitted about what was found on the unlawful search of Sobel's premises would, if the trial had been in a Federal Court, under the authority of the *McDonald* and supporting cases, be grounds for reversal. Why? Because the admission of the evidence violated the provisions of the Fourth Amendment to the Constitution of the United States.

Is it to be assumed that the language in the Texas Statute, "or of the Constitution of the United States of America" is meaningless?

We think not.

But even if there had been no such language, the construction given to the Texas Constitution provision would be grounds for reversal.

The very evident conflict and confusion in the Texas decisions amount to a deprivation of Appellant's rights as a "citizen of the United States" guaranteed to him by the

Fourteenth Amendment to the Constitution of the United States.

An examination of the *Johnson case (92 L. Ed. 436)* shows that Johnson was convicted on the charge of violation of narcotic laws of the United States. The only question before the Court was whether it was lawful without a warrant of any kind, to arrest Anne Johnson and search her living quarters.

The statement shows that Federal narcotic agents, upon information from City Police, went to Petitioner's hotel room smelled opium burning, demanded and were granted entrance then arrested Petitioner and without a warrant, searched her room. Evidence thus obtained was used against the Defendant at the trial which resulted in a conviction.

The Court said: "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without warrant would reduce the amendment to a nullity and leave the people's homes secure only in the discretion of police officers."

The point raised here by Appellant is that the interpretation put upon the Texas Statute by the Texas Court is in violation of *Art. 1, Section 9, of the Texas Constitution* and of the *Fourth Amendment to the Constitution of the United States* which is specially adopted by said Statute and as so construed deprives this defendant of his liberty and property without due process of law and denies to him

the equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States.

It may be conceded that the State Courts have the right to pass upon the constitutionality of its laws but after the State has construed the constitutionality of a law, if such construction is violative of the constitutional rights of a citizen of the United States, the Supreme Court of the United States has jurisdiction to pass upon the question involved and the right to reverse a decision affirming the action of the Trial Court in admitting such illegal testimony.

The decisions of the Supreme Court upon which the *McDonald decision* is based are:

*Johnson v. United States, 333 U. S. 10;*
*Frupiano v. United States, 334 U. S. 699;*
*Weeks v. United States, 232 U. S. 383;*
*G-Bart Imp. Co. v. United States, 282 U. S. 358.*

The Court cites the case of *Agnello v. United States, 70 L. Ed. 145*, where the Court said "Belief, however well founded that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

The Supreme Court in the *Johnson case* proceeded to say: "If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate is difficult to think of a case in which it should be required."

In that case as in the case at bar, it was conceded that the search or breaking was illegal. There was no writ in either case.

The Court says in conclusion, "An officer gaining access to private living quarters under color of his office and of the law which he personifies, must then have some valid basis in law for the intrusion. Any other rule would undermine the right of the people to be secure in their persons, houses, papers and effects, and would obliterate one of the most fundamental distinctions between our form of government where officers are under the law, and the police state where they are the law."

In the summary of the *Johnson case* it is said: "It was held that the evidence obtained by the search should have been suppressed on the grounds that the search was made without a warrant and was not justifiable as an incident of a legal arrest." The case was reversed.

This is the exact legal question in the case at bar, except that it arises here under the Texas Constitution. But since the Texas Statute specifically bans such evidence and says that "no evidence obtained by an officer or other person in violation of any provisions * * * of the Constitution of the United States of America shall be admitted in evidence against the accused on the trial of any criminal case" the ruling in the case at bar is directly in the face of the Texas Statute, and as such is contrary to the holding of the Supreme Court of the United States. It thereby is the deprivation of Appellant's rights without due process of law, contrary to the Fourteenth Amendment to the Federal Constitution."

The other case mentioned by the Court in the *McDonald case* is that of *Frupiano v. United States, 92 L. Ed. 1198*, handed down March 9, 1948. In that case, a Federal agent, present with the consent of the property owner, found and seized an illegal still. It was held by the Court and so stated in the summary, "that the evidence obtained by the seizure should have been suppressed on the ground that the search was made without a search warrant which there was ample opportunity to obtain and that in view of such opportunity and the lack of an apparent need for summary seizure, the search was not justifiable as an incident of a legal arrest."

Specifically, the case holds, as stated in the headnotes: "Where property is illegally seized in violation of the Fourth Amendment it is error to deny a motion to exclude and suppress evidence obtained by such seizure." This is the exact holding contended for here by Appellant.

The Texas Court of Criminal Appeals in the case of *Calge v. State, 180 S. W. (2d) 967*, said, "The Courts, both State and Federal, have been very zealous in guarding and protecting the security of a man's home against unreasonable searches and seizures as guaranteed in our *Bill of Rights, Art. 1, Sec. 9, Constitution of Texas*, and in the *Fourth Amendment to the Federal Constitution*. A liberal construction has been adopted to preserve that right."

This statement is right in line with that of Justice Douglas' in the *McDonald case*, when he wrote:

> "This guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike. It marks the right of privacy as one of the unique values of our civilization and with few exceptions, stays the hands of the police unless they have a search warrant issued by a magistrate on probable cause supported by oath or affirmation. And the law provides as a sanction against the flouting of this constitutional safeguard the suppression of evidence secured as a result of the violation, when it is tendered in a federal court."

## CONCLUSION

It would seem to take no argument to demonstrate

1. That the search was illegal,

2. That the testimony thus obtained was inadmissible,

3. That such testimony was not only material but was indispensible to a conviction,

4. That Appellant Defendant below, made no admissions that relieved the State from the error of the illegal search and resultant erroneous admission of testimony,

5. That the very severity of the punishment itself raises a presumption of wrongful deprivation of Appellant's constitutional right to a fair trial,

6. That only by reversal with directions to the Trial Court not to admit the illegal testimony may justice be done.

For all of which reasons we most earnestly pray that this cause be here reversed and remanded for a new trial, or in the alternative be here dismissed.

Respectfully submitted,

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